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Nos. 80-1517, 80-6307, and 80-6309

In the Supreme Court of the United States

OCTOBER TERM, 1980

FRANK JULIUS MAZZUCA, PETITIONER

v.

UNITED STATES OF AMERICA

RONALD JOHN WILLIAMS, PETITIONER

v.

UNITED STATES OF AMERICA

GEORGE V. JANOVICH, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the group of tavern owners and others associated in this case for the purpose of operating and controlling the local tavern business constituted an "enterprise" within the meaning of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.* (all petitioners).

2. Whether tape recordings of conversations between petitioner Janovich and an undercover federal agent should have been excluded from evidence because they were not authorized by state law (petitioner Janovich).

3. Whether the district court erred in admitting the out-of-court statements of two unindicted co-conspirators (petitioner Janovich).

4. Whether the proof at trial established multiple conspiracies rather than the single conspiracy charged in the indictment (petitioner Janovich).

TABLE OF CONTENTS

Page

Opinion below 1

Jurisdiction 2

Statement 2

Argument 5

Conclusion 9

TABLE OF AUTHORITIES

Cases: cert denied

Caliguri v. *United States*, No. 80-6047 (Mar. 9, 1981) 5

Carbone v. *United States*, cert. denied, No. 80-900 (Feb. 23, 1981) 3, 5

State v. *Williams*, 94 Wash. 2d 531, 617 P.2d 1012 6

United States v. *Bianchi*, 542 F. 2d 98 6

United States v. *Briggs*, 514 F. 2d 794 7

United States v. *Chadwick*, 556 F. 2d 450 7

United States v. *Doulin*, 538 F. 2d 466, cert. denied, 429 U.S. 895 7

United States v. *Durland*, 575 F. 2d 1306 7

United States v. *Forsythe*, 560 F. 2d 1127 6

United States v. *Kearney*, 560 F. 2d 1358, cert. denied, 434 U.S. 971 9

United States v. *Malatesta*, 538 F. 2d 748, modified on other grounds, 590 F.3d 1379, cert. denied, 444 U.S. 846 6

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Page

Cases—Continued:

United States v. *Moten*, 564 F. 2d 620, cert. denied, 434 U.S. 959 9

United States v. *Nelligan*, 573 F. 2d 251 6

United States v. *Perry*, 550 F. 2d 524, cert. denied, 434 U.S. 827 9

United States v. *Ricco*, 549 F. 2d 264, cert. denied, 431 U.S. 905 9

United States v. *Smith*, 596 F. 2d 319 7

United States v. *Sutton*, 605 F. 2d 260, overruled on rehearing en banc, 642 F. 2d 1001, petitions for cert. pending, Nos. 80-6058, 80-6137, 80-6141, 80-6147, 80-6253, 80-6254, 80-6272 5

United States v. *Testa*, 548 F. 2d 847 6

United States v. *Turkette*, No. 80-808 (argued Apr. 27, 1981) 5

Statutes and rule:

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq.* 5

18 U.S.C. 1961(1) 6
18 U.S.C. 1962(c) 2
18 U.S.C. 1962(d) 2
18 U.S.C. 1963(a) 3

18 U.S.C. 2 2

18 U.S.C. 1341 2

18 U.S.C. 1510 2

18 U.S.C. 1511 2

Page

Statutes and rule—Continued:

18 U.S.C. 1951 2
18 U.S.C. 1955 2
18 U.S.C. 2511(2)(c) 6
Wash. Rev. Code § 9.73.03 (1979) 6
Fed. R. Evid. 801(d)(2)(E) 7

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-45a)[1] is reported at 634 F. 2d 1159.

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[1]"Pet. App." refers to the appendix to the petition in No. 80-1517.

JURISDICTION

The judgment of the court of appeals was entered on October 6, 1980. A petition for rehearing was denied on January 7, 1981. The petitions for a writ of certiorari were filed as follows: No. 80-1517, on March 6, 1981; No. 80-6307, on March 7, 1981; No. 80-6309, on March 5, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Western District of Washington, petitioner Williams was convicted on one count of participating in the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c) (Count II); one count of conspiring to commit that offense, in violation of 18 U.S.C. 1962(d) (Count I); four counts of interfering with interstate commerce by threats or violence, in violation of 18 U.S.C. 1951 and 2 (Counts III-VI); two counts of obstructing a criminal investigation, in violation of 18 U.S.C. 1510 and 2 (Counts VII and VIII); two counts of conducting an illegal gambling business, in violation of 18 U.S.C. 1955 and 2 (Counts IX and X); one count of obstructing state law enforcement, in violation of 18 U.S.C. 1511 (Count XI); and two counts of mail fraud, in violation of 18 U.S.C. 1341 and 2 (Counts XIII and XIV). Petitioners Mazzuca and Janovich were each convicted on the counts involving RICO conspiracy and obstruction of state law enforcement. In addition, petitioner Mazzuca was convicted on both counts of conducting an illegal gambling business.

Petitioner Williams was sentenced to concurrent terms of 20 years' imprisonment on Counts I and II and to five-year terms of imprisonment on each of the 11 remaining counts, to be served concurrently with each other but consecutively to the sentences on Counts I and II; he was also fined a total of $162,000, and his interest in a tavern involved in the

racketeering violations was forfeited to the United States under 18 U.S.C. 1963(a). Petitioner Mazzuca was sentenced to concurrent terms of 15 years' imprisonment on Count I and five years' imprisonment on each of the three remaining counts, and he was fined a total of $30,000. Petitioner Janovich was sentenced to concurrent terms of 12 years' imprisonment on Count I and five years' imprisonment on Count XI. The court of appeals affirmed (Pet. App. 1a-45a).

The extensive evidence at trial is summarized in the opinion of the court of appeals (Pet. App. 3a-6a, 13a-15a, 20a-24a, 29a-30a, 34a, 37a-40a, 42a-43a). In brief, it established the existence of an informal association of tavern owners and others in Pierce County, Washington, which advanced the tavern businesses of its members through murder, arson, bribery, gambling, mail fraud, extortion, and obstruction of criminal investigations (*id.* at 2a). The criminal activities of the association are outlined in our opposition to the petition for a writ of certiorari filed by petitioners' co-defendants, John Carbone and Joseph Carbone. See *Carbone* v. *United States*, cert. denied, No. 80-900 (Feb. 23, 1981).[2]

Petitioners Williams and Mazzuca owned taverns in Pierce County and were members of the Carbone organization (Pet. App. 2a, 37a); Williams was the "chief lieutenant" of the organization (*id.* at 2a). Between 1972 and 1977, the organization arranged for various taverns owned by its members to be burned down in order to collect the insurance proceeds; thereafter, the mortages and debts were paid, and the premises were remodeled or new establishments were opened nearby (*id.* at 3a & n.1). In addition, federal undercover agents infiltrated gambling activities at

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[2]Copies of our opposition in *Carbone* are being provided to counsel for petitioners.

two taverns in which Williams and Mazzuca had an ownership interest; gambling at these establishments included blackjack and pot limit poker games, which were illegal under state law. Williams and Mazzuca also actively participated in negotiations to sell one of these taverns to an undercover agent posing as a potential buyer, and they informed the agent that a price could be arranged to include law enforcement "protection" by the sheriff's office; thereafter, Williams arranged a meeting between the agent and petitioner Janovich, the Sheriff of Pierce County. Moreover, following the closure of three taverns owned by members of the organization for topless dancing violations, Williams arranged for the attempted assassination of the responsible state liquor control board supervisor. Finally, Williams was involved in a scheme to blow up a tavern owned by a competitor of the organization's members (*id.* at 4a-6a, 29a-30a, 38a-39a).

Petitioner Janovich, the Sheriff of Pierce County, assisted the organization by providing law enforcement "protection" for its activities and harassing its competitors. For example, Janovich refrained from interfering in the organization's illegal gambling operations and accepted $1,300 for "protection" from the undercover agent posing as a buyer of the tavern owned by petitioners Williams and Mazzuca. Janovich also inhibited arson investigations into the organization, arranged a meeting between Williams and an assistant attorney general directing the state's organized crime unit, afforded advance notice of planned raids, and warned Williams of federal "heat." In addition, Janovich was involved in an "emphasis patrol" of the tavern of a competitor, culminating in visits to the tavern by 15 law enforcement personnel within a 30-minute period (Pet. App. 3a, 14a, 23a-24a, 39a-40a).

ARGUMENT

1. Petitioners contend (Mazzuca Pet. 16-24; Williams Pet. 5-7; Janovich Pet. 7-9) that the conduct for which they were charged and convicted does not fall within the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.* They argue that the RICO counts were based on an alleged "enterprise" having no legitimate purpose, and that the RICO statute is applicable only to legitimate enterprises that are subsequently corrupted by racketeering activity.

As petitioners recognize, the issue whether a group of individuals associated in fact to commit unlawful acts for profit can constitute an enterprise under RICO is currently before this Court in *United States* v. *Turkette*, No. 80-808 (argued Apr. 27, 1981). However, as we explained in our opposition to the petition for a writ of certiorari in *Carbone* v. *United States, supra*, in which petitioners' co-defendants raised the same claim asserted here, the court of appeals correctly held that the association in this case "satisfies the narrower definition of a group 'organized and acting for some ostensibly lawful purpose, either formally declared or informally recognized' " (Pet. App. 11a, quoting *United States* v. *Sutton*, 605 F. 2d 260, 264 (6th Cir. 1979), overruled on rehearing, 642 F. 2d 1001 (6th Cir. 1980) (en banc), petitions for cert. pending, Nos. 80-6058, 80-6137, 80-6141, 80-6147, 80-6253, 80-6254, 80-6272). And, following the grant of certiorari in *Turkette*, this Court denied the petitions filed by petitioners' co-defendants in *Carbone* v. *United States, supra*, and *Caliguri* v. *United States*, No. 80-6047 (Mar. 9, 1981). Accordingly, it is unnecessary to defer consideration of the instant petitions pending disposition of *Turkette*.

2. Petitioner Janovich contends (Pet. 4-7) that tape recordings of conversations he and petitioner Williams had

with a federal undercover agent should have been excluded from evidence. He invokes Wash. Rev. Code § 9.73.030 (1979), which prohibits the recording of oral communications absent the consent of all parties or a court order. However, the court of appeals correctly held (Pet. App. 6a-7a n.4) that the admissibility of evidence in federal courts is determined by federal rather than state law. See, *e.g.*, *United States* v. *Nelligan*, 573 F. 2d 251, 253-254 (5th Cir. 1978); *United States* v. *Testa*, 548 F. 2d 847, 855-856 (9th Cir. 1977).[3] As Janovich acknowledges (Pet. 4), federal law expressly permits "a person acting under color of law," such as the undercover agent here, to intercept communications to which he is a party. 18 U.S.C. 2511(2)(c).

Petitioner's claim (Pet. 5) that the state statute should apply because the RICO conspiracy count was predicated in part on the violation of state gambling laws is insubstantial. RICO does not punish violations of state law as such, but instead defines a new federal offense premised on a legitimate federal interest in eradicating racketeering and organized crime. See, *e.g.*, *United States* v. *Forsythe*, 560 F. 2d 1127, 1135 (3d Cir. 1977); *United States* v. *Bianchi*, 542 F. 2d 98, 101 (1st Cir. 1976). Although various state law violations are enumerated as "racketeering activity" in 18 U.S.C. 1961(1), their inclusion "is solely for definitional purposes" with respect to one element of a RICO offense and does not serve to equate the distinct federal and state crimes. *United States* v. *Malatesta*, 583 F. 2d 748, 757 (5th Cir. 1978), modified on other grounds, 590 F. 2d 1379 (en banc), cert. denied, 444 U.S. 846 (1979).

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[3] *State* v. *Williams*, 94 Wash. 2d 531, 617 P.2d 1012 (1980), upon which Janovich relies (Pet. 7), explicitly recognizes that "federal authorities can * * * use * * * evidence in federal court as Congress intended" irrespective of "state statutory criteria * * * appli[cable] to determine the admissibility of federal agents' evidence in state court" (617 P.2d at 1017).

3. Petitioner Janovich also argues (Pet. 9-11) that the district court erred in admitting into evidence the out-of-court statements of Undersheriff Carl Skagg and Inspector David Larson as statements of co-conspirators under Fed. R. Evid. 801(d)(2)(E). Specifically, he challenges this evidence on the grounds that the indictment did not name Skagg and Larson as unindicted conspirators and that he was not informed that they were co-conspirators until the day before their statements were admitted.

The failure to name Skagg and Larson in the indictment did not bar the admission of their statements. It is well settled that the admissibility of an out-of-court declaration by a co-conspirator does not depend on the existence of a conspiracy count in the indictment, let alone on the inclusion of the declarant as a co-conspirator. See, *e.g.*, *United States* v. *Smith*, 596 F. 2d 319 (8th Cir. 1979); *United States* v. *Durland*, 575 F. 2d 1306 (10th Cir. 1978); *United States* v. *Doulin*, 538 F. 2d 466 (2d Cir.), cert. denied, 429 U.S. 895 (1976).[4]

Janovich has also failed to demonstrate that any prejudice resulted from the delay in identifying Skagg and Larson as co-conspirators. Indeed, he was notified of their status only 10 days after the start of a three-month trial and a full two months before he began presenting evidence; yet at no time did he attempt to contest the admissibility of their statements.

Furthermore, the government had substantial justification for withholding the information until that time. The primary sources of the information concerning Skagg and Larson were attorney Sam Allotta and his secretary, Linda

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[4]Indeed, some courts have expressly condemned the practice of naming co-conspirators in an indictment without charging them. See *United States* v. *Chadwick*, 556 F. 2d 450 (9th Cir. 1977); *United States* v. *Briggs*, 514 F. 2d 794, 804-805 (5th Cir. 1975).

Nacewicz. Both witnesses had expressed their fears to the prosecutor that they would be murdered before they could testify; indeed, Nacewicz had received a warning from Joseph Carbone that she should not cooperate with the prosecutor "or else" (Tr. 1225). In view of these concerns and the nature of the violent crimes charged against the defendants (including threats of murder and the near-fatal assault on suspected informant Jerome Weinstein (Pet. App. 5a, 13a-15a, 30a-33a)), the prosecution chose not to make a more complete disclosure until the safety of Allotta and Nacewicz had been ensured (Tr. 1225). In these circumstances, the out-of-court statements were not rendered inadmissible simply because such disclosure was not made at some earlier point.

4. Petitioner Janovich lastly asserts (Pet. 11-12) that the district court erred in failing to give a multiple-conspiracy instruction because the "protection" arrangement with the undercover agent who posed as a potential buyer of the tavern owned by Williams and Mazzuca was unrelated to the RICO conspiracy. However, the evidence showed an extensive relationship between Janovich and the Carbone organization wholly apart from this incident (see page 4, *supra*) and was sufficient to prove the existence of a single conspiracy. Moreover, the evidence established that this "protection" arrangement was closely connected to the other affairs of the enterprise: the arrangement was negotiated through petitioners Williams and Mazzuca and was included by them in the sale price of the tavern to the undercover agent (Pet. App. 4a-5a); Williams was promised "a piece of the action" in return for the sale of "protection" and was to oversee the operation of the tavern (Ct. Exh. 64 at 19-20; Ct. Exh. 65 at 82); and Mazzuca and other members of the organization were to work for the agent (Ct. Exh. 65 at 138-139). This evidence adequately demonstrated that there was a single conspiracy "to operate and

control enterprise taverns and related activities with minimal interference from law enforcement agencies" (Pet. App. 13a) and that Janovich's "dealings with the agent did not form a separate conspiracy, but were acts in furtherance of a continuing conspiracy by inducing the 'buyer' to become a new participant" (*id.* at 40a). Accordingly, the district court properly concluded that a multiple-conspiracy instruction was not required. See, *e.g.*, *United States* v. *Moten*, 564 F. 2d 620, 625 (2d Cir.), cert. denied, 434 U.S. 959 (1977); *United States* v. *Kearney*, 560 F. 2d 1358, 1363 (9th Cir.), cert. denied, 434 U.S. 971 (1977); *United States* v. *Perry*, 550 F. 2d 524, 531 (9th Cir.), cert. denied, 434 U.S. 827 (1977); *United States* v. *Ricco*, 549 F. 2d 264, 267-268 (2d Cir.), cert. denied, 431 U.S. 905 (1977).[5]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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[5]At all events, the court's charge stated that a conspiracy involved "a mutual understanding to try to accomplish a common and unlawful plan," that a co-conspirator was one who participated in the conspiracy "with knowledge of the essential nature of the unlawful plan," and that, in order to convict, the jury had to find that "the conspiracy alleged in the Indictment" was proven beyond a reasonable doubt (Instruction No. 25). These instructions were adequate to apprise the jury of the government's obligation to establish a single conspiracy consisting of a common plan or agreement.

DOJ-1981-05

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